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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 625

THE UNITED STATES, PETITIONER

v.

HAZEL L. FAUBER, ADMINISTRATRIX, C.T.A.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on December 6, 1948.

OPINIONS BELOW

The opinions of the Court of Claims (R. 55, 85) are reported at 93 Ct. Cls. 11 and 81 F. Supp. 218.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1948 (R. 91). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether, under a statutory authorization to sue for "reasonable and entire compensation" (35 U. S. C. 68), a patent owner's recovery from the United States for the unauthorized use of his invention may, in addition to a reasonable royalty, include as a part of his compensation an award of interest dating from the time of infringement.

STATUTES INVOLVED

28 U. S. C. 2516(a) provides:

> § 2516. Interest on claims and judgments
>
> (a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

The Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, 40 Stat. 705 (35 U.S.C. 68) provides:

> whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however,* That said Court of Claims shall not entertain a suit or award compensation under the provisions of this section where the claim for

compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided, further,* That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise; *And provided further,* That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this section apply to any device discovered or invented by such employee during the time of his employment or service.

STATEMENT

This action was brought on April 26, 1932, pursuant to a special act of Congress waiving periods of limitation (46 Stat. 2134), to recover compensation under the Act of June 25, 1910, as amended July 1, 1918 (36 Stat. 851, 40 Stat. 705, 35 U. S. C. 68, *supra*), for the alleged infringement by the United States, from 1912 to 1929, of numerous inventions claimed in two patents (R. 1-6). Pursuant to Rule 39 of the Rules of the Court of Claims, the first hearing related only to the questions of the validity and infringement of the claims made; the question of the amount of recovery was reserved for later determination (R. 13, 74). All of plaintiff's nine claims under the patents, except one,

were held either invalid or not infringed, in a judgment entered March 31, 1941 (R. 72). On the Government's motion of July 1, 1942, the case was held in an inactive status because of the war until November 16, 1945 (R. 77). In the subsequent proceeding to determine the reasonable and entire compensation for the single claim held to be valid and infringed, the court awarded judgment on December 6, 1948, for $88,686 as a reasonable royalty "together with an additional amount, as part of entire or just compensation, measured by a reasonable rate of interest of 4% per annum" on the annual amounts computed to be owing as reasonable royalties for the years 1917 through 1929 (R. 91, 86).

The patents in question were issued to William H. Fauber in 1910 and 1912 (R. 12). In this action brought by the administratrix of his estate, it was contended that inventions disclosed in these patents were used by the United States in the construction of certain hydroairplanes (R. 12). Both patents relate to the hull construction of "hydroplane boats" which are so constructed as to receive support when in motion from the dynamic reaction of the water upon surfaces or "hydroplanes" (R. 13). The effect of the reaction is to reduce resistance by raising the hull partly out of the water, which causes the boat to plane on the surface of the water and facilitates the attainment of high speeds (R. 13). The claims under these patents relate principally to a boat having a bottom formed

of a series of V-shaped hydroplane surfaces in stepped relation from fore to aft (R. 21-22, 63-64). The only difference significant here between the first and second patents is that the latter discloses a bottom in which each rear hydroplane surface has a flatter V form than the forward hydroplane surface (R. 64-65).

The alleged infringing structures were all limited to various forms of hull construction utilized in seaplanes and flying boats in which the hull or pontoon member of the airplane was found by the Court of Claims to possess the characteristics and functions of a boat while maneuvering on the surface of the water (R. 13, 63). It appears that Mr. Fauber first presented his claim to the Navy Department for the use of his inventions in August 1917, and frequently advanced his claim from that time until March 1928 (R. 60). From the outset, the Navy Department was of the opinion that the questions of infringement and validity of these patents were so controversial in nature as to require a judicial determination before an expenditure of government funds would be justified (R. 60). Accordingly, Mr. Fauber was repeatedly given to understand that he could not look to the Secretary of the Navy for the settlement of his claim and he was advised of his possible remedy in the Court of Claims (R. 59-60). A claim made to the War Department was also denied and he was again advised of the possibility of resort to the Court of Claims (R. 61). As previously indicated, the present action was not instituted until April 26, 1932, pursuant to

a special act of March 3, 1931 (46 Stat. 2134) conferring jurisdiction on the Court of Claims to hear the claim under the Act of June 25, 1910, as amended, "notwithstanding the lapse of time or the statute of limitations" (R. 12). No reason appears for this delay of 15 years in institution of suit. See H. Rep. No. 2450 and S. Rep. No. 1770, 71st Cong., 3d sess. The special statute contained no provision for the payment of interest on the claim (R. 12-13).

In the first proceeding, dealing with the questions of validity and infringement, four claims based on the first patent and three based on the second were held invalid as disclosed in the prior art (R. 55, 65). Two claims of the second patent were held valid but only one was held to have been infringed (R. 55, 65). All the claims related in general to various formations of V-shaped hydroplane surfaces (R. 63). The valid claims related to a structure embodying a V-type stepped hydroplane surface bottom in which the V-shape of the rear hydroplane was flatter than the V of the forward hydroplane (R. 53-54). The terminology of one of these valid claims was held applicable to the hulls of several hydroplanes constructed by the Government and the plaintiff was held entitled to recover compensation for the unauthorized use by the United States of the invention disclosed in this claim (R. 54, 55).

In the proceeding for the determination of the reasonable and entire compensation due for infringement of the single claim under the second

patent, the Court of Claims found that hydroairplane hulls embodying the valid claim were constructed by the Government from 1917 through April 30, 1929, the date of the patent's expiration (R. 74, 79). Taking into account a variety of factors, the Court of Claims reached the conclusion that a fair and reasonable royalty upon which to base compensation was 1½% of the cost per hull (R. 84). Setting forth in tabular form the total cost of hull construction for each year from 1917 through 1929 and the reasonable royalty computed at 1½% of this cost, the Court of Claims found the total reasonable royalty to amount to $88,686 (R. 84).

Although neither the percentage figure nor the amount of the reasonable royalty was fixed by the court until December 6, 1948, the court found that reasonable and entire compensation consisted of this computed reasonable royalty "together with an additional amount measured by a reasonable rate of interest at 4% per annum on the individual amounts" designated in the table for each year from 1917 through 1929 (R. 85). The interest was to be computed, beginning January 1, 1918, from January 1 of each year following the year of infringement to the date of payment of the judgment (R. 85). The interest alone would exceed $100,000, more than the award of reasonable royalties. This additional amount was "allowed not as interest but as a part of entire and just compensation", in reliance upon *Waite* v. *United States*, 282 U. S. 508 (R. 85, 86, 90).

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in including in the judgment against the United States as a part of reasonable and entire compensation, interest, computed from the dates of infringement, on the reasonable royalty fixed by the court as the proper measure of damages.

REASONS FOR GRANTING THE WRIT

The instant case is one of a long series of decisions in which the Court of Claims has construed the statute authorizing a patent owner to sue the United States for "his reasonable and entire compensation" for the unauthorized use by the United States of patented inventions (35 U. S. C. 68), as requiring the Government to pay interest from the time of infringement upon a subsequently determined reasonable royalty. (See Point 3, *infra*.) We believe the decision should be reviewed and corrected by this Court because, without any evidence of such a congressional purpose, it imposes upon the Government a greater liability for patent infringement than the law places upon a private infringer. Moreover, the decision must be deemed to contravene the statutory prohibition against the allowance of interest on claims against the United States, especially in the light of the recent decisions of this Court which hold the prohibition applicable unless specifically waived by the express language of a statute or contract.

1. The inclusion by the Court of Claims, in a judgment for "reasonable and entire compensa-

tion", of an additional amount measured by interest for a period before the claim has been liquidated requires the Government to pay greater compensation for infringement than the patent owner could recover from a private infringer. Since the statute authorizing suit against the United States for the unauthorized use of patented inventions contains no suggestion that such a result was intended, we believe the allowance of interest is plainly erroneous.

a. The decisions of this Court clearly establish that under the general rule of damages in patent infringement cases interest does not begin to run until the damages have been liquidated. *Duplate Corp.* v. *Triplex Co.*, 298 U. S. 448, 459; *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441, 457; *Tilghman* v. *Proctor*, 125 U. S. 136, 160, 161; *Mowry* v. *Whitney*, 14 Wall. 620, 653. This has long been the rule, and any doubts that may reasonably have existed with respect to its applicability to a case like the present one, involving damages based upon a reasonable royalty, were dispelled in *Duplate Corp.* v. *Triplex, supra*, decided in 1936. It is the clear holding of the *Duplate* decision that, in the absence of exceptional circumstances, "an award of damages upon the basis of a reasonable royalty" should bear interest "from the date when the damages are liquidated, and not, as by the present decree, from the date of the last infringement" (p. 459). The rule announced in the *Duplate* case has been consistently applied by the federal courts, in patent infringement cases dealing with the award

of reasonable royalties, to preclude the allowance of interest for any period before damages have been liquidated.[1] See, *e. g.*, *Reynolds Spring Co.* v. *L.A. Young Industries,* 101 F. 2d 257, 262 (C. A. 6); *Dixie Cup Co.* v. *Paper Container Mfg. Co.,* 169 F. 2d 645 (C. A. 7); *Enterprise Mfg. Co.* v. *Shakespeare Co.,* 141 F. 2d 916, 921 (C. A. 6); *General Motors Corporation* v. *Dailey,* 93 F. 2d 938, 942 (C. A. 6) *Wedge* v. *Waynesboro Nurseries,* 31 F. Supp. 638, 642, 645 (W. D. Va.); *Kaltenbach* v. *Chesapeake & Ohio Ry. Co.,* 43 F. Supp. 819, 820 (E. D. Va.); cf. *Clair* v. *Kastar, Inc.,* 70 F. Supp. 484, 492 (S. D. N. Y.). Thus, unless the Act of June 25, 1910 (as amended) defines the liability of the United States in broader terms than that of a private infringer, there would appear to be no basis whatever for the award by the Court of Claims of additional compensation, measured by interest dating from periods prior to the liquidation of the claim by the judicial determination of the reasonable royalty.

b. Neither the statutory language nor the legislative history of the provision granting the right to sue the United States for its unauthorized use of patented inventions supports an interpretation which would allow a greater recovery against the United States than against a private litigant. Under the statute (Act of June 25, 1910, as amended,

[1] It should be noted that the instant decision allows interest even prior to "the date of last infringement," a date sometimes employed before the question became settled in the *Duplate* case, and goes back to each successive year of infringement.

35 U. S. C. 68), the patent owner is entitled to recover "his reasonable and entire compensation" for the Government's infringement. In the light of the disallowance of interest on unliquidated claims against private parties, this general language, without more, can hardly be deemed to import a congressional intention to enlarge the recovery of the patent owner in his suit against the Government.

Similarly, there is no suggestion in the legislative background that such interest was contemplated by the statutory language. The original statute enacted in 1910 (36 Stat. 851), authorizing suit against the United States for patent infringement, provided for the recovery of "reasonable compensation." The only purpose of this enactment was to give the Court of Claims jurisdiction to "entertain suits against the United States for the infringement or unauthorized use of a patented invention, in certain cases, and award reasonable compensation to the owner of the patent." H. Rep. No. 1288, 61st Cong., 2d sess., pp. 1, 3. The phrasing of the measure of relief was changed to "reasonable and entire compensation" when the statute was amended in 1918 (40 Stat. 705) in order to authorize suit against the United States for the patent infringements of its contractors. This change in language, however, had no relation to the payment of interest. "The purpose of the amendment was to relieve the contractor *entirely* from liability of every kind for the infringement of patents in manufacturing anything for the Government" and

"the word 'entire' emphasizes the exclusive and comprehensive character of the remedy provided." *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 343 (emphasis supplied). The Court presumed that Congress intended "to secure to the owner of the patent the exact equivalent of what it was taking away from him." *Id. at* 345.

There is no indication, therefore, either in the statutory language or in the history of the legislation to support the theory that Congress intended "reasonable and entire compensation" to include interest which would not have been allowed in a private suit. On the contrary, the purpose to make the remedy against the United States "the exact equivalent" of the remedy available against a private infringer contradicts any such intention.

c. The enlargement of recovery in the instant case to include added compensation for interest was based upon the decision in *Waite* v. *United States,* 282 U. S. 508 (R. 86, 90), in which the Court held "that interest should be allowed in order to make the compensation 'entire' ", and expressed the view that an additional purpose of the word was "to accomplish complete justice as between the plaintiff and the United States" (p. 509). We believe that the circumstances in which the *Waite* decision was rendered, and the subsequent development of the law, justify its reconsideration at this time.[2]

[2] In the *Waite* case, the patent owner's damages were measured by his loss of profits rather than by a reasonable royalty as in the present case. This fact, however, would not seem to present a stronger case for the allowance of interest.

The holding in the *Waite* case appears to have rested in large measure upon the concession of the Government that interest should have been allowed. 282 U. S. at 508. The basis of the Government's concession, however, was that interest would have been allowed upon the recovery of a reasonable royalty in a suit for infringement between private parties. There was also a suggestion in the Government's brief that "reasonable and entire compensation" was the equivalent of "just compensation" which had been held, at the time of that decision, to include an allowance for interest in eminent domain cases. Brief for the United States, October Term, 1930, No. 103, pp. 3-7. The opinion in the *Waite* case clearly reflects the weight given the Government's concession, which was regarded as substantially equivalent to a confession of error. The question presented by this petition, therefore, has never been considered in truly adversary proceedings.

Moreover, the subsequent decisions of this Court clearly demonstrate that both grounds of the Government's concession were erroneous. We have already shown that, contrary to the Government's position in the *Waite* brief, interest on the recovery of a reasonable royalty for patent infringement will not ordinarily be allowed in non-government actions. *Duplate Corp.* v. *Triplex Co., supra,* p. 9. Thus, "the exact equivalent" of the remedy against a private infringer, which would seem to satisfy the requirement of "complete justice" in measuring the liability of the United States (*Waite*

case, *supra*), would be a judgment which did not include interest before liquidation of the claim.

In addition, as the subsequent discussion will point out in greater detail (*infra* pp. 15-16), the recent decisions of this Court establish that even use of the phrase "just compensation" in non-eminent domain situations, in the absence of a specifically expressed intention to pay interest, will not warrant an award of interest against the Government. *United States* v. *Thayer-West Point Hotel Co.*, 329 U. S. 585; *United States* v. *New York Rayon Importing Co.*, 329 U. S. 654; *United States* v. *Goltra*, 312 U. S. 203.[3] In these circum-

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[3] And even if the allowance of recovery for the Government's unauthorized use of a patent be deemed to convert that use into an eminent domain taking (see *Crozier* v. *Krupp*, 224 U.S. 290), "just compensation" would seem to require no more than the equivalent of the remedy available against a private infringer. The unauthorized use of a patent by the United States, however, would not seem to constitute an eminent domain taking. Before the 1910 statute was enacted such unauthorized use was regarded as a tort for which no recovery could be had against the United States. *Schillinger* v. *United States*, 155 U.S. 163. And decisions since its enactment continued to regard the Government's liability as that for the tort of infringement. *Keifer & Keifer* v. *R. F. C.*, 306 U.S. 381; *Esnault-Pelterie* v. *United States*, 303 U.S. 26, 28; *Bliss Co.* v. *United States*, 253 U.S. 187; *De Forest* v. *United States*, 273 U.S. 236, 240. Since the statute on its face does no more than give the consent of the United States to be sued for the tort of infringement (see *Keifer & Keifer* v. *R. F. C.*, *supra*), the theory of an eminent domain taking seems highly questionable. Although there were intimations of such a theory in *Crozier* v. *Krupp*, 224 U.S. 290 (cf. *Yearsley* v. *Ross*, 309 U.S. 18, 21-2), the question was not presented in that case. See *Cramp & Sons* v. *Curtis Turbine Co.*, 246 U.S. 28, 43-45.

stances, we do not believe that the *Waite* case should stand in the way of the Government's attempt at this time to prevent its liability from exceeding that of private persons in identical situations.

2. The decision below disregards the prohibition of 28 U.S.C. 2516 against the allowance of interest by the Court of Claims on a claim against the United States except "under a contract or Act of Congress expressly providing for payment thereof" (*supra* p. 2).[4] The Act of June 25, 1910, as amended July 1, 1918 (35 U.S.C. 68), authorizes a patent owner to recover from the United States in a suit in the Court of Claims "the reasonable and entire compensation" for the unauthorized use or manufacture by the United States of an invention covered by a patent. The award of interest in this case, not "as interest" but "in order to make the compensation to the patentee entire or just" (R. 90), appears to be predicated upon the statutory language authorizing the recovery of "reasonable and entire compensation." The decision in *Waite* v. *United States,* 282 U.S. 508, upon which the court relied, is clearly based upon the use of "entire" in the legislation.

The recent decisions of this Court strongly indicate, however, that interest cannot be allowed,

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[4] Similar prohibitions have been in effect since 1863. 12 Stat. 766; 36 Stat. 1141; 42 Stat. 316; 43 Stat. 346; 44 Stat. 119 (see Judicial Code, Sec. 177, 28 U.S.C. 284).

either as interest proper or as an additional allowance to make compensation whole, in the absence of specific, unambiguous statutory language. *United States* v. *Goltra,* 312 U.S. 203; *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585; *United States* v. *New York Rayon Importing Co.,* 329 U.S. 654. The requirement of "entire compensation" would hardly seem more comprehensive than the phrase "just compensation," with its constitutional connotations, which has been held insufficient, in non-eminent domain legislation, to justify a relaxation of the explicit statutory bar against interest. *United States* v. *Goltra, supra; United States* v. *Thayer-West Point Hotel Co., supra.* Furthermore, it is highly doubtful that Congress contemplated that its language would remove the existing statutory prohibition against the payment of interest, because when the statute in question was originally enacted in 1910, and amended in 1918, even the "just compensation" requirement of the Fifth Amendment had not been interpreted to include interest from the time of the taking. As late as 1920 in *United States* v. *North American Co.,* 253 U. S. 330, the Supreme Court held that a claimant seeking just compensation in the Court of Claims was not entitled to interest on the award from the time of the taking. Cf. *United States* v. *Thayer-West Point Hotel Co., supra.* The allowance of interest on the basis of the statutory language, therefore, clearly conflicts with the Act's purpose and history, as well as

with the recent decisions of the Court which deny interest in the absence of a specific authorization.

3. The question is important because it is one which constantly recurs in the Court of Claims. Since the decision in the *Waite* case in 1931 many judgments have been awarded against the United States which included interest before liquidation of the claims. *Shearer* v. *United States,* 101 C.Cls. 196; *National Electric Sig. Co.* v. *United States,* 99 C.Cls. 621; *National Electric Sig. Co.* v. *United States,* 99 C.Cls. 646; *Marconi* v. *United States,* 99 C.Cls. 1, 100 C.Cls. 566; *de Simone* v. *United States,* 100 C.Cls. 566; *Esnault-Pelterie* v. *United States,* 97 C.Cls. 719; *Ordnance Engr. Corp.* v. *United States,* 96 C.Cls. 278; *Olsson* v. *United States,* 87 C.Cls. 642; *Meurer Steel Barrel Co.* v. *United States,* 85 C.Cls. 554; *Barlow* v. *United States,* 87 C.Cls. 287; *Ordnance Engr. Corp.* v. *United States,* 84 C.Cls. 1; *Allgrunn* v. *United States,* 84 C.Cls. 476; *Welin Davit & Boat Corp.* v. *United States,* 78 C.Cls. 772; *John Firth* v. *United States,* 74 C.Cls. 740; *Carley Life Float Co.* v. *United States,* 74 C.Cls. 682. In many of these cases, as in the present one (*supra,* p. 7), the patent owner's recovery was more than doubled as a result of the allowance of interest, although there may be no showing of fault on the part of the Government for the delay in bringing suit. In addition, the number of infringement actions which may be brought against the Government as a result of the vast amount of manufacturing activities performed for the Government in the recent war is incalculable.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1949

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